AMARAPATHI PERIASAMY

v.

MUNIANDY PERIASAMY

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
HASHIM YUSOFF JCA
JAMES FOONG JCA
[CIVIL APPEAL NO: M-02-211-05]
20 SEPTEMBER 2005

FAMILY LAW: *Children - Custody - Appellant's appeal against High Court judge's decision dismissing her application for interim custody of her niece - Whether provisions of Law Reform (Marriage and Divorce) Act 1976 applicable - Whether appellant fell within contemplation of word "guardian" under provisions of Guardianship of Infants Act 1961 - Welfare of child - Whether appeal ought to be allowed*

This was an appeal by the appellant, the respondent's sister, against the decision of the learned High Court judge dismissing her application for interim custody of the respondent's third child (hereafter referred to as 'L'). It was the appellant's case that the respondent and his wife had, on 6 May 1994, entrusted L together with her health and birth certificates to the appellant and her husband, and that she had since looked after L. About 10 years later, the respondent took over custody of L and prevented the appellant from taking L back, causing the appellant to file the above-mentioned application. The appellant, although not disputing that the respondent was L's natural father and conceding that she had not obtained an adoption order in relation to L, submitted that she had been playing the role of custodian and guardian to L and argued that this was an exceptional situation under s. 88 of the Law Reform (Marriage and Divorce) Act 1976 ('the 1976 Act') to allow her application. The learned judge was of the view that as far as ss. 2, 3, 5 and 11 of the Guardianship of Infants Act 1961 ('the Act') were concerned, the rights and authority were vested in the child's mother and father and not, for example, in an aunt. In relation to the 1976 Act, the learned judge was of the view that that piece of legislation had no bearing upon the instant proceedings *viz.* the application was not based on any matrimonial dispute. Ultimately, the learned judge ruled that the appellant had not proved that she had a superior right of custody and guardianship of L to the exclusion of the respondent and, therefore, dismissed her application with costs. Hence, the present appeal.

Held (dismissing the appeal with costs)
Per Mohd Ghazali Yusoff JCA:

[1] There was nothing erroneous with the decision of the learned judge since the provisions of the 1976 Act did not have any relevance in the instant proceedings. The 1976 Act, according to its preamble, is "An Act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide matters incidental thereto". It was obvious that the word "child" appearing in ss. 88 and 90 of the 1976 Act refers to a child of the marriage. Thus, the provisions of the 1976 Act surely could not be at all applicable to the instant proceedings since the dispute here did not relate to a matrimonial dispute between parties to a marriage. (p 273 c-d)

[2] The appellant did not fall within the contemplation of the word "guardian" under the provisions of the Act and her application also did not fall within any of the provisions of the Act. L had parents who were still living and they seemed to be happily married. The appellant had never been appointed as the guardian of L by her parents pursuant to the provisions of any written law. Further, there was nothing to show that L's parents had ever abandoned her. The evidence showed that the respondent, upon the appellant's request, allowed the latter to look after L when she was about 3½ months old. L had stayed with the appellant and her husband until November 2004. The respondent contended that he had taken L back on seven occasions – a claim that was never seriously disputed by the appellant – but had given in to her plea that she continue looking after L for a further period. He acceded to her request as she was his sister and also due to the belief in their community that a person who took care of another person's child will be blessed with an own child. However, this was only a temporary measure or arrangement and the respondent had never abandoned L to the care of the respondent. L was now living with her immediate family and would grow up with her brothers and sister and with her natural parents. There was nothing to show that L's parents were unsuitable people to take care of L. The court was primarily concerned with the welfare of L and not that of the parties to the dispute. Therefore, the appeal was dismissed. (pp 275 b-d & 276 c-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan oleh perayu, iaitu kakak responden, terhadap keputusan yang arif hakim Mahkamah Tinggi kerana menolak permohonan beliau untuk perintah jagaan sementara anak ketiga responden (selepas ini disebut 'L'). Adalah menjadi kes perayu bahawa responden serta isterinya, pada 6 Mei 1994, telah mengamanahkan L bersama-sama dengan sijil kesihatan dan kelahirannya kepada

perayu dan suaminya, dan bahawa beliau sejak itu telah menjaga L. Lebih kurang 10 tahun kemudian, responden telah mengambil L dan telah menghalang perayu dari mengambilnya kembali, sekaligus menyebabkan pemfailan permohonan di atas oleh perayu. Perayu, sementara tidak menafikan bahawa responden adalah bapa kandung L dan bahawa beliau tidak memperoleh perintah pengangkatan untuk L, berhujah bahawa beliau telah berperanan sebagai seorang penjaga kepada L dan bahawa ini adalah suatu keadaan terkecuali untuk membenarkan permohonannya di bawah s. 88 Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 1976'). Yang arif hakim berpendapat bahawa mengambil kira peruntukan ss. 2, 3, 5 dan 11 Akta Penjagaan Budak 1961 ('Akta'), hak dan kuasa adalah terletak pada ibu dan bapa budak dan bukan, umpamanya, pada seorang ibu saudara. Berhubung Akta 1976, yang arif hakim mengambil pandangan bahawa perundangan tersebut tidak berkaitan dengan prosiding semasa, kerana permohonan bukan berasaskan kepada apa-apa pertikaian perkahwinan. Akhirnya, yang arif hakim merumuskan bahawa perayu gagal membuktikan bahawa beliau mempunyai hak penjagaan yang lebih kukuh terhadap L berbanding dengan responden dan, kerana itu, menolak permohonan dengan kos. Perayu telah merayu.

Diputuskan (menolak rayuan dengan kos):

[1] Tidak ada apa-apa silapnya dengan keputusan yang arif hakim kerana peruntukan Akta 1976 memang tidak relevan kepada prosiding semasa. Akta 1976, menurut kata pengantarnya, adalah "Suatu Akta bagi membuat peruntukan berkenaan dengan perkahwinan-perkahwinan monogami dan pengupacaraan dan pendaftaran perkahwinan-perkahiwnan itu; bagi meminda dan menyatukan undang-undang berhubung dengan perceraian; dan bagi membuat peruntukan berkenaan dengan perkara-perkara bersampingan dengannya". Adalah jelas bahawa perkataan "anak" di dalam s. 88 dan 90 Akta 1976 merujuk kepada anak dari perkahwinan. Maka itu, Akta 1976 tentunya tidak terpakai kepada prosiding semasa, kerana masaalah di sini tidak berkait dengan pertikaian perkahwinan di antara pihak-pihak suatu perkahwinan.

[2] Perayu tidak dirangkum oleh perkataan "penjaga" di bawah peruntukan Akta dan permohonannya juga tidak termasuk ke dalam mana-mana peruntukan Akta. L mempunyai ibu bapa yang masih hidup di mana perkahwinan mereka adalah bahagia. Perayu tidak pernah dilantik sebagai penjaga L oleh ibu bapa L di bawah mana-mana peruntukan undang-undang. Selain itu, tiada keterangan yang menunjukkan bahawa ibu bapa L telah membuangnya. Keterangan menunjukkan bahawa responden, atas permintaan perayu, telah membenarkan perayu menjaga L ketika L berusia 3½ bulan. L tinggal bersama-sama dengan perayu dan suaminya sehingga

tahun 2004. Responden mengatakan bahawa beliau telah mengambil balik L sebanyak tujuh kali – suatu pengataan yang tidak dinafikan secara serius oleh perayu – tetapi telah menurut permintaan perayu supaya ia menjaga L untuk tempoh yang lebih lama. Beliau menuruti kehendak perayu kerana perayu adalah kakaknya dan juga kerana kepercayaan masyarakat mereka bahawa sesiapa yang menjaga anak orang lain akhirnya akan mendapat anak sendiri. Bagaimanapun, semua ini hanyalah suatu persetujuan atau langkah sementara dan responden tidak pernah membuang L supaya dijaga oleh perayu. L kini tinggal dengan keluarga terdekatnya dan akan membesar bersama-sama dengan adik beradik serta ibu bapa kandungnya. Tidak ada sesuatu pun yang menunjukkan bahawa ibu bapa L adalah orang yang tidak sesuai untuk menjaga L. Mahkamah lebih menekankan kebajikan L dan bukannya pihak-pihak kepada pertelingkahan. Rayuan, dengan itu, adalah ditolak.

Case(s) referred to:
Arumugam Seenivasagam v. Sinnamah [1959] 25 MLJ 130 ***(dist)***
Masam v. Salina Saropa & Anor [1974] 2 MLJ 59 ***(dist)***
Re McGrath (infants) [1893] 1 Ch 143 ***(foll)***

Legislation referred to:
Guardianship of Infants Act 1961, ss. 2(1), 3, 4, 5, 6, 7, 8, 8A(1)(a), (2), 11, 13
Law Reform (Marriage and Divorce) Act 1976, ss. 88, 90

For the appellant - Ng Aik Beng; M/s AB Ng & Assoc
Respondent in person

[Appeal from High Court, Melaka; Originating Summons No: 24-561-2004]

Reported by Suresh Nathan

JUDGMENT

Mohd Ghazali Yusoff JCA:
The appellant, the respondent's sister was married to one Subramaniam a/l Ellappan on 4 July 1990. She is childless. The respondent was married to one Janaki a/p Subramaniam on 18 May 1988 and was blessed with four children. His third child, a girl was born on 21 January 1994 (hereafter referred to as "L").

It is the appellant's case that on 6 May 1994, the respondent and his wife entrusted L together with her health and birth certificates to the appellant and her husband. The appellant claimed that she had since looked after L who was brought up in Kuantan, Pahang where the appellant's husband was working with the Veterinary Department from 1989 to 2001 with a monthly income of RM2,442. In 2002 the appellant and her husband together with L moved to

Melaka as her husband was transferred to the Veterinary Department, Melaka. The appellant averred that the respondent and his wife seldom contacted L whilst she was living with them. She paid for L's expenses throughout her stay with them. She alleged that the respondent earned only RM800 per month as a bread-seller.

On 10 November 2004, the appellant and her husband together with L visited the respondent and his family who was living in Jitra, Kedah and stayed there until 18 November 2004. The respondent requested the appellant to leave L with him for a few days and promised to return L to the appellant in Melaka. L however stayed on with the respondent and his family. The appellant then went to the respondent's house to take L but was prevented from doing so.

On 9 December 2004 the appellant filed an application by way of originating summons and prayed for, *inter alia*, the following reliefs:

(i) that she be given interim custody of L;

(ii) that the respondent surrender L to her;

(iii) that the respondent be given reasonable access to L.

In her affidavit, the appellant alleged that L was not happy living with the respondent. The respondent had even lodged a police report alleging that she wanted to kidnap L. The appellant did not dispute the fact that the respondent was L's natural father and conceded that she had not obtained an adoption order in relation to L.

Before the learned judge in the court below, the appellant's counsel submitted that the appellant has been playing the role of a custodian and guardian to L and so should continue to have custody and guardianship. Counsel argued that this is an exceptional situation under s. 88 of the Law Reform (Marriage and Divorce) Act 1976 ("the 1976 Act") to allow the prayers sought by the appellant.

The learned judge dismissed the appellant's application and hence, this appeal.

In his judgment, the learned judge said having regard to the facts as alleged in the appellant's affidavits, read together with the submission presented by her counsel, he was of the view that the question for him to determine was as follows:

> Where the natural father of a child has entrusted his child to the care of the child's aunt for some 11 years without any adoption order, and the father has subsequently taken back the child in exercise of his right of custody and guardianship over his own child, does the child's aunt acting under sections 2,

3, 5 and 11 of the Guardianship of Infants Act 1961 have a superior right of custody and guardianship of the child to the exclusion of the child's natural father?

The learned judge was of the view that as far as ss. 2, 3, 5 and 11 of the Guardianship of Infants Act 1961 ("the Act") were concerned, the rights and authority are vested in the child's mother and father and not, for example, an aunt. In relation to the 1976 Act, which was referred to by the appellant's counsel, and which incidentally was not identified as one of the matters under which the application was made, the learned judge was of the view that that piece of legislation has no bearing upon the instant proceedings, *viz.*, the application was not based on any matrimonial dispute. At the end of the day the learned judge ruled that the appellant has not made a case that she has a more superior right of custody and guardianship of L to the exclusion of the respondent and hence dismissed her application with costs.

In his judgment, in relation to s. 88 of the 1976 Act, the learned judge said:

> In relation to the Law Reform (Marriage and Divorce) Act 1976, it is axiomatic that it has been enacted to provide for the law relating to divorce and matrimonial proceedings, including ancillary relief such as the custody and protection of a 'child' which has been defined as 'child of the marriage' under the age of 18 years: see s. 2 thereof. Section 88 thereof confers upon the court to make an order for custody, where relevant, ...
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> In my view, s. 88 applies only where the parents of the child have commenced matrimonial proceedings including a prayer for an order for custody of a child of their marriage under the 1976 Act. However, the instant proceedings do not concern any matrimonial proceedings based on any matrimonial dispute. In the circumstances, I do not see how the facts of the instant application would fall under s. 88.

Before us, the appellant's counsel again referred to s. 88 of the 1976 Act which reads:

> 88. Power for court to make order for custody.
>
> (1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.
>
> (2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:
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> (a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in custody of the same person but shall consider the welfare of each independently.

The appellant's counsel also referred to s. 90 of the 1976 Act which reads:

90. Declaratory order as to unfitness of parent to have custody.

(1) The court may, when granting a divorce or judicial separation or at any time thereafter, on the application of the father or the mother of any child of the marriage, make an order declaring either parent to be a person unfit to have the custody of the child and may at any time rescind any such order.

(2) Where an order has been made under subsection (1), and has not been rescinded, the parent thereby declared to be unfit shall not, on the death of the other person, be entitled to the custody of such child unless the court otherwise orders.

Counsel then referred to *Masam v. Salina Saropa & Anor* [1974] 2 MLJ 59. In that case the appellant, an unmarried mother, who was working in three bars, the working hours of which were 11am to 3pm and 3pm to midnight, gave her child by one G.S. into the custody of the respondents when the child, who was born on 28 August 1970 was 9 days old. On 16 March 1972 the appellant married an Australian resident and desired to take the child to Australia and settle there. In the District Court, Kuching her application for custody under the Guardianship of Infants Ordinance (Sarawak Cap. 93) was resisted by the respondents. The District Court dismissed her claim upon finding that the appellant has never shown and has never had the slightest interest in the child apart from giving him some presents whereas the respondents had lavished their loving care and affection on the child. The appellant appealed to the High Court. In dismissing her appeal BTH Lee, J said (at pp. 59-60):

The Guardianship of Infants Ordinance (Sarawak Cap. 93) enacts in section 2 that in matters regarding custody or upbringing of an infant the welfare of the infant should be regarded by the courts as the first and paramount consideration.This is a statutory provision, and in my judgment section 2 is quite clear, see *Re Satpal Singh, An Infant.* The headnote reads:

'Welfare' referred to in section 11 (our section 2) of the Guardianship of Infants Ordinance must be taken in the large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child will be happier in one place than in another but his general well-being. The welfare of the child, both moral and physical, should be the paramount consideration in awarding the custody of a child of tender years. The court, in exercising its discretion under the Ordinance, should bear in mind the customs of the parties but should not consider itself bound by them as then it would not be exercising the discretion entrusted to it by the Ordinance."Every case must plainly be determined upon the particular circumstances affecting that case, though, it is of course, true to say that as a matter of human sense an infant is better with its mother and needs a mother's care. In this case unhappily the mother left the child when he was 9 days old. The mother's attitude to the child seems to me, as is with the magistrate, to have been very different. The magistrate was satisfied that the mother has never shown and has never had the slightest interest in this infant apart from giving him some presents.It is clear that the first and paramount consideration is the welfare of the child, to which all other considerations are subordinate. These subordinate considerations include the mother's wishes and the fact that she is the natural mother. See the Court of Appeal decision in Re C (MA) (an infant) and *Thomas John Barnardo v. Margaret McHugh* where Lord Herschell in the course of his judgment said at page 399:

> I think this case determine (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shown that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother.

The fact that change of custody may unsettle the mind of the infant is only a circumstance to be considered and ought not to be regarded as a complete bar to any change.There can be no doubt on the evidence that the foster parents have lavished loving care and affection on the infant.If the infant were taken away from the foster parents after such a length of time the result might be that he would develop a permanent emotional scar.The court below is right when it says it is not possible to forecast with any certainty what the future would hold for him in Australia, and he would be in a completely alien environment.

The appellant's counsel also referred to the *Arumugam s/o Seenivasagam v. Sinnamah* [1959] 25 MLJ 130. In that case the applicant, the father of the child, applied for an order that the respondent do surrender the child to his custody. The child was born on 15 May 1942, her mother dying shortly afterwards from complications consequent on the birth. The respondent, who

was present and assisted at the birth at the request of the child's mother, agreed a few days later at the applicant's request to look after the child. The applicant thereupon handed over the child to the respondent together with her birth certificate. Ever since then the child has been living with and has been looked after by the respondent. The learned judge noted that the child will be 17 years of age on or about 15 May 1959. In dismissing the application, Hepworth J said (at p. 133):

> To summarise I think that the position in this country is:
>
> (a) at Common Law that the parent has, as against other persons generally, an absolute right to the custody of the child, unless he or she has forfeited it by certain sorts of misconduct or the right of the parent has been otherwise affected by some specific statutory provision;
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> (b) in equity that the dominant matter for the consideration of the Court is the welfare of the child, although a parent has a right but not an absolute right to the custody of the child and the Court will be very cautious in regard to the circumstances in which they will interfere with the parental right. The Court has to consider the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child, and the happiness of the child. That being the case it seems to me that by acquiescing in the respondent having the guardianship and the custody of the child for the last 16 years and contributing little or nothing towards her maintenance, the applicant, although he cannot be said to have been guilty of any active misconduct, has placed himself in such a position that it would not only be better for the child but essential for its welfare for the child to remain in the custody of the respondent. I think that all the considerations which weighed with Lord Esher in the case of *The Queen v. Gyngall* are present in this case and should be considered in the same light. I should add that, quite apart from the above considerations, I am satisfied that the above conclusion is correct because I spoke to Ponnachi in Chambers at the request of Counsel for both parties, but in their absence, and she stated unequivocally that she wished to remain with the respondent and did not wish to have anything whatever to do with the applicant. This application is dismissed with costs.

The respondent in the instant appeal, who was not represented by counsel here and in the court below, opposed the appeal. In his written submission, he stated that when L was 3½ months old, the appellant and her husband, being childless wanted to borrow L temporarily in the hope that by looking after L, they believed that they would be also be blessed with a child. Due to the pleas made by the appellant, he and his wife reluctantly acceded to her request. The handing over was done at a temple in Jitra, Kedah. The appellant also promised that she would bring L for monthly visits. The appellant failed to do so for six months upon which he went to her house to take L back to be with her family. The appellant however again pleaded with him that she be

allowed to keep L for a longer period and he and his wife reluctantly gave in. The respondent stated that he has taken L back to be with her immediate family on seven occasions and that the contention of the appellant that he never visited L was not true. He stressed that he had never given any right to guardianship over L to the appellant. He had reluctantly allowed the appellant to look after L due to the belief amongst their community that she would be blessed with a child by doing so.

We find nothing erroneous with the decision of the learned judge. We do not see the relevance of any of the provisions in the 1976 Act *vis-a-vis* the instant proceedings. The 1976 Act, according to its preamble, is "An Act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide matters incidental thereto." What is obvious to us is that the word "child" appearing in ss. 88 and 90 refers to a child of the marriage. The provisions of the 1976 Act surely cannot at all be applicable to the instant proceedings. The dispute here does not relate to a matrimonial dispute between parties to a marriage. The appellant, who is the respondent's sister, had applied for, *inter alia*, the following orders:

(i) that she be given interim custody of L;

(ii) that the respondent surrender L to her; and

(iii) that the respondent be given reasonable access to L.

The appellant is clearly praying for only interim custody. L is now about 11½ years of age. What is not in dispute is she is now living with her natural parents and her brothers and a sister. The appellant had applied for an order that she be given interim custody of L and had based her application under ss. 2, 3 and 11 of the Act which are as follows:

(a) section 2(1) provides "infant" means a person who has not attained his majority;

(b) section 3 reads:

> The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education.;

(c) section 11 reads:

> The Court of a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

The word "guardian" is not defined under the Act. According to *Osborn's Concise Law Dictionary* (7th ed) the word "guardian" means "a person having the right and duty of protecting the person, property of rights of one who is without full legal capacity or otherwise incapable of managing his own affairs". Section 3 of the Act provides the guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education. The respondent insisted that he had never appointed the appellant to be L's guardian. We also noted that the appellant has not shown that she is a person authorized by an adoption order over L under the Adoption Act 1961. In filing this application, she seems to have acted under the assumption that she is L's legal guardian and hence should be entitled to be given interim custody.

It has not been canvassed here and in the court below as to what is meant by "interim custody" under the circumstances in these proceedings. It has also not been canvassed here and below that the appellant's application fall within the contemplation of the Act. Section 4 of the Act provides for duties of a guardian of property of an infant. Section 6 provides, *inter alia*, that the Court, may if it thinks fit, appoint a guardian to act jointly with a surviving parent. Section 7 provides that a parent may by deed or will appoint any person to be guardian of an infant after that parent's death. Such a guardian may apply to the court for, *inter alia*, an order that the guardian shall be the sole guardian of the infant and also an order regarding the custody of the infant and the right of access to the surviving parent to the infant as the court thinks fit. Section 8 provides if both parents of an infant have died without appointing a testamentary guardian, any magistrate, penghulu, police officer or Protector may cause the infant to be taken before the court and the court shall appoint a guardian of the infant's person and property or either of them. Section 8A(1)(a) provides if an infant has been abandoned by, *inter alia*, his parent and no other suitable person is willing and able to care for him, the court:

> (aa) shall appoint a Protector to be a temporary guardian of the infant's person and property or either of them until such time as a guardian of the infant's person and property can be appointed;
>
> (bb) shall determine the extent of the powers and duties of the Protector as a temporary guardian in relation to the infant's person and property; and
>
> (cc) may impose such other terms and conditions as, having regard to the welfare of the infant, the Court thinks fit.

Section 8A(2) provides subsection (1) shall apply whether or not an infant is placed in a place of safety or in the care, custody and control of a foster parent pursuant to any law relating to the care and protection of an infant. Section 11 requires the court or a judge, in exercising the powers conferred

by the Act, to have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be. Section 13 provides where an infant leaves, or is removed from, the custody of his lawful guardian, the court or a judge may order that he be returned to such custody.

We are of the view that the appellant does not at all fall within the contemplation of the word "guardian" under the provisions of the Act. We are also of the view that the appellant's application does not at all fall within any of the provisions of the Act. L has parents who are still living and they seem to be happily married. The appellant has never been appointed as guardian of L by her parents pursuant to the provisions of any written law. Further, there is nothing to show that L was ever abandoned by her parents. The evidence showed that the respondent, upon the appellant's request, allowed the latter to look after L when she was about 3½ months old. L had stayed with the appellant and her husband until November 2004. The respondent contended he had taken L back on seven occasions, which claim was never seriously disputed by the appellant, but had given in to her plea that she continue looking after L for a further period. He acceded to her request as she was his sister and also due to the belief amongst their community that a person who takes care of another person's child will be blessed with an own child; but this was only as a temporary measure or arrangement.

We are of the view that the circumstances in the instant proceedings are clearly distinguishable from that found in *Masam v. Salina Saropa & Anor, supra,* cited by the appellant's counsel. In that case the appellant, an unmarried mother, whose working hours were from 11am to midnight obviously was not in a position to look after her child. She gave her child into the custody of the respondents when the child was nine days old. She married an Australian when her child was about 1½ years old and wanted to take the child to Australia and settle there. The court dismissed her claim for custody upon finding that the appellant has never shown and has never had the slightest interest in the child apart from giving him some presents whereas the respondents had lavished their loving care and affection on the child. The facts there are obviously distinguishable. In the instant proceedings, L, who is now 11 years old, is now staying with her natural parents and her two brothers and a sister in Kedah. She would not be in a completely alien environment.

Arumugam s/o Seenivasagam v. Sinnamah, supra, which was also referred to by the appellant's counsel at this appeal, was a case decided under the common law and equity and not under the provisions of the Act, *viz.*, it was decided before the Act was promulgated. Furthermore, the facts of that case were clearly different. In that case, the mother of the child died shortly after delivery and the respondent, who was present and assisted at the birth at the

request of the child's mother, agreed a few days later at the father's request (the applicant) to look after the child. Hepworth J held that by acquiescing in the respondent having the guardianship and the custody of the child for the last 16 years and contributing little or nothing towards her maintenance, the applicant had placed himself in such a position that it would not only be better for the child but essential for its welfare for the child to remain in the custody of the respondent. We do think we need to make any further reference to *Arumugam s/o Seenivasagam v. Sinnamah.*

In the instant proceedings, the respondent had never abandoned L to the care of the respondent. She is now living with her immediate family and will grow up with her brothers and sister and with her natural parents. There is nothing to show that L's parents are unsuitable to take care of L. The court is primarily concerned with the welfare of L and not with the welfare of the parties to the dispute. Lindley LJ said in *Re McGrath (infants)* [1893] 1 Ch 143 that the welfare of a child is not to be measured by money only or by physical comfort only and that the word "welfare" must be taken in its widest sense. He was also of the view that the moral and religious welfare of the child must be considered as well as its physical well-being.

For the reasons above, we dismissed this appeal with costs and ordered that the deposit be paid towards the account of taxed costs.